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No. 78-1302

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN F. WALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a civil contempt order arising out of a grand jury proceeding on the grounds that the acting United States Attorney in charge of the grand jury investigation was without power to seek a grant of immunity for petitioner's testimony (Pet. 14-20) and that, because petitioner is a state legislator, he was entitled to invoke a common-law legislative privilege (Pet. 20-21). However, petitioner purged himself of contempt by testifying, and review by this Court of that nonappealable order is not warranted.

1. In September 1978, petitioner was subpoenaed to appear before a grand jury in the United States District Court for the Northern District of Illinois.[1] Because the

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[1]As a result of this investigation, petitioner had previously been convicted of extorting money under color of official right in violation of the Hobbs Act, 18 U.S.C. 1951. *United States* v. *Wall*, No. 78-1601 (7th Cir. Dec. 11, 1978), cert. pending, No. 78-1347 (filed March 2, 1979).

regular United States Attorney in the Northern District of Illinois had disqualified himself and his office from this investigation, Thomas Henderson, a Department of Justice attorney designated by Assistant Attorney General Civiletti to be acting United States Attorney in this investigation, was in charge of these grand jury proceedings. Petitioner appeared before the grand jury on September 28 and refused to testify, claiming both a Fifth Amendment privilege against self-incrimination and a common-law speech or debate privilege for state legislators. Thereafter, Henderson obtained authorization from Assistant Attorney General Civiletti and petitioned the district court, pursuant to 18 U.S.C. 6003, for an order granting petitioner use immunity and ordering him to testify. Following entry of the immunity order, petitioner was again summoned to testify, and he again refused (Pet. App. 2).

On November 29, 1978, the district court found petitioner to be in civil contempt, and ordered him to be imprisoned for the duration of the grand jury (but not to exceed 18 months), or until petitioner agreed to testify (Pet. App. 2). The district court stayed this order until December 4, 1978, in order to allow petitioner to seek a further stay of the contempt order pending appeal. The court of appeals declined to grant the stay, and petitioner subsequently stated that he would testify rather than go to jail. On December 7, 1978, petitioner testified before the grand jury, thereby purging himself of the contempt.

On appeal, the court of appeals first concluded that petitioner's contentions were not moot because the government might call him before the same grand jury again and because petitioner sought to challenge the order of immunity as well as his duty to testify (Pet. App. 3-5). The court held, however, that Henderson had authority to

petition the court for an order of immunity (Pet. App. 5-9). The court did not consider whether petitioner could appeal from the now purged contempt order.[2]

2. At the outset, we note that the court of appeals was without jurisdiction to consider petitioner's appeal. It is well settled that the denial of a motion to quash a subpoena is not ordinarily an appealable order. *E.g.*, *United States* v. *Nixon*, 418 U.S. 683, 690-691 (1974); *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906). Accordingly, a person who seeks to resist the production of evidence and wishes to establish his right to appellate review of an order compelling testimony must generally refuse to comply with that order and suffer the consequences of his contempt. See *United States* v. *Ryan, supra*, 402 U.S. at 532-533; *Cobbledick* v. *United States, supra*, 309 U.S. at 328. This case presents no exceptional circumstances warranting departure from this well-established rule.

That petitioner temporarily was held in civil contempt prior to his decision to testify does not render the district court's order denying petitioner's motion to quash the grand jury subpoena appealable. A grand jury witness is entitled to "no further protection * * * than that afforded by the district court until the witness chooses to disobey and is committed for contempt." *Cobbledick* v. *United States, supra.* Indeed, if momentary contempt followed by immediate compliance could render the denial of a motion to quash appealable, every grand jury witness could readily avoid the finality requirement of 28 U.S.C. 1291. See *United States* v. *Nixon, supra*, 418 U.S. at 690.

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[2]Since petitioner conceded that his legislative privilege claim was foreclosed at least in the Seventh Circuit by that court's decision in *United States* v. *Craig*, 537 F. 2d 957 (7th Cir.) (*en banc*), cert. denied, 429 U.S. 999 (1976), the court did not consider that claim either.

Such a result would have a deleterious effect upon grand jury investigations and would emasculate the "strong Congressional policy against piecemeal review, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals" that is embodied in Section 1291. See *United States* v. *Nixon*, *supra*, 418 U.S. at 690. Nor can petitioner avoid the finality requirement of Section 1291 by focusing his appeal on the order of immunity underlying his testimony rather than on the order denying his motion to quash the subpoena. See *In re Ryan*, 538 F. 2d 435 (D.C. Cir. 1976). In short, petitioner chose to testify, and he cannot thereafter undo that decision upon appeal. See *United States* v. *Ryan*, *supra*, 402 U.S. at 532.[3]

3. In any event, neither of petitioner's substantive arguments warrants review by this Court.

a. Petitioner contends (Pet. 14-20) that Henderson, the designated acting United States Attorney in this investigation, was not empowered to seek a grant of immunity under 18 U.S.C. 6003.[4] However, petitioner cannot contend that he suffered as a result of Henderson's request since the district court's order was, without question, sufficient to protect petitioner's Fifth Amendment rights even if Henderson's request for an immunity order were technically defective under 18 U.S.C. 6003. See

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[3]Although the government argued below that petitioner's claims were mooted by his decision to testify (a position to which we continue to adhere), no challenge was made to the court of appeals' power under Section 1291 to hear petitioner's claims. Nonetheless such a jurisdictional question may be raised in this Court for the first time. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976).

[4]Petitioner does not contend that Henderson was improperly designated as acting United States Attorney. See 28 U.S.C. 515(a); 28 C.F.R. 0.13. Nor does petitioner dispute that the proper officials in the Department of Justice authorized the request for an order of immunity.

United States v. *Monia*, 317 U.S. 424, 427-429 (1943); *Lefkowitz* v. *Turley*, 414 U.S. 70, 79-80 (1973); *Maness* v. *Meyers*, 419 U.S. 449, 475 (1975) (White, J., concurring). It is therefore not readily apparent that petitioner has standing to raise this claim, especially since the requirements of Section 6003 "were not intended to protect witnesses but to minimize overuse of immunity grants." *United States* v. *Yanagita*, 552 F. 2d 940, 947 (2d Cir. 1977). Compare *United States* v. *Giordano*, 416 U.S. 505 (1974).

Moreover, as the court of appeals correctly concluded (Pet. App. 5-9), Henderson was authorized by 28 U.S.C. 515(a) to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings * * * which United States attorneys are authorized by law to conduct * * *." And where, as here, the United States Attorney has disqualified himself, the acting United States Attorney must necessarily be able to seek a grant of immunity as a concomitant to his authority to conduct the grand jury investigation. See also *Ryan* v. *Commissioner*, 568 F. 2d 531, 540 (7th Cir. 1977), cert. denied, No. 77-1512 (Oct. 2, 1978); *In re Grand Jury Proceedings*, 554 F. 2d 712, 713 (5th Cir.), cert. denied, 434 U.S. 892 (1977); *United States* v. *Smith*, 532 F. 2d 158, 160 (10th Cir. 1976).

b. Petitioner also claims (Pet. 20-21) that he was entitled to invoke a legislative privilege akin to that provided by the Speech or Debate Clause of the United States Constitution. The issue whether such a legislative privilege exists under Rule 501 of the Federal Rules of Evidence is a substantial one. See *United States* v. *Gillock*, petition for cert. pending, No. 78-1455. However, this is not an appropriate case to consider this issue. As demonstrated above, petitioner is attempting to challenge a nonappealable order. Moreover, petitioner's voluntary decision to testify before the grand jury ended the actual controversy between the parties, thereby rendering his claim of privilege moot. See, *e.g.*, *County of Los Angeles*

v. *Davis*, No. 77-1553 (March 27, 1979); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *North Carolina* v. *Rice*, 404 U.S. 244 (1971); *Golden* v. *Zwickler*, 394 U.S. 103 (1969).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[5]Because it was petitioner's behavior that mooted his claims and not the action of the government nor the termination of the grand jury, this case does not present a situation "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

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